January 19, 2016

Department of Labor
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
200 Constitution Avenue, NW
Washington, DC 20210
Attn: State Savings Arrangement Safe Harbor

RIN: 1210-AB71—State Savings Arrangement Safe Harbor

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we are writing this letter in response to the request for comments on the Proposed Regulations pertaining to Savings Arrangements Established by States for Non-Governmental Employees[1] and the Interpretive Bulletin relating to Stating Savings Programs that Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974 (ERISA)[2] which were both published in the Federal Register on November 18, 2015.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. The Chamber is particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Introduction

A number of states are attempting to expand retirement coverage by implementing state legislation for retirement programs for private employers. These programs range from mandatory

[1] 80 Fed. Reg. 72006 (November 18, 2015).
[2] 80 Fed. Reg. 71936 (November 18, 2015).

programs to open exchanges.[3] The implementation of certain programs is conditioned on them not being found to be ERISA plans. Further, there is concern about the state legislation being preempted by ERISA.

The DOL has issued two pieces of guidance to address these issues. The Proposed Regulation pertaining to Savings Arrangements Established by States for Non-Governmental Employees ("Proposed Regulation") creates a safe harbor for these state retirement programs to not be considered "employee benefit plans" for purposes of ERISA.[4] While the ultimate determination of ERISA preemption is up to the courts, the objective of the guidance is to reduce the risk of the state programs being found preempted.[5]

The Interpretive Bulletin relating to State Savings Programs that Sponsor or Facilitate Plans Covered by ERISA ("Interpretive Bulletin") provides guidance for state laws designed to expand the retirement savings options available to private sector workers through ERISA-covered retirement plans. In particular, the Interpretive Bulletin provides guidance for states wanting to implement a marketplace, prototype plan, or multiple employer plan (MEP) approach.

The Chamber has serious concerns about both pieces of guidance. While the Proposed Regulation attempts to present a pathway to reduce the risk of such state programs being preempted, we believe the proposal counters the intent of the ERISA statute and specifically undermines the objective of ERISA preemption. Moreover, we are concerned that the Proposed Regulation removes important ERISA protections and that workers will not be adequately protected. Consequently, we recommend that the DOL withdraw the Proposed Regulation because it counters the intent of ERISA. At the very least, the Proposed Regulation should be amended to apply only to those state programs where employer participation is voluntary.

The Interpretive Bulletin creates an unfair advantage for states over private providers in the MEP market. Under the Interpretive Bulletin, states are given an advantage over private providers in being allowed to create pools that private employers are not able to create. Consequently, we recommend that the DOL provide guidance that creates an even playing field

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[3] While no state has a functional state-run plan at this time, several states have passed legislation that can or will lead to the formation of state-run plans. *The California Secure Choice Retirement Savings Trust Act (S.B. 1234)* - signed into law on September 28, 2012 - requires employers with 5 or more employees that do not already offer a qualified retirement plan to enroll their employees in a new type of savings plan based on IRAs at a contribution rate of 3%, with a guaranteed benefit. *The Illinois Secure Choice Savings Program Act (S.B. 2758)* - signed into law on January 4, 2015 - requires employers with 25 or more employees that do not already offer a qualified retirement plan to enroll their employees in a state-run automatic enrollment payroll deduction Roth IRA with a 3% payroll deduction, but employees are able to change their deduction amount and can affirmatively opt out if they wish. A match or employer contribution is not required. *The Washington Small Business Retirement Marketplace (SB 5826)*—passed in both the Washington Senate and House—provides for a small business retirement marketplace that allows employers with less than 100 employees to voluntarily choose from a range of investment options provided through the marketplace.

[4] 80 Fed. Reg. at 72008. The safe harbor applies to a state savings program that is established as an individual retirement plan (i.e., IRA) pursuant to state law. The safe harbor delineates the responsibilities of the state and the limited involvement of the employer. In addition, the employer's participation must be required by state law and the employee's participation must be voluntary. For purposes of the safe harbor, the employee's participation is considered voluntary even if automatic enrollment is used.

[5] 80 Fed. Reg. at 72006.

between the state and private providers. Specifically, such guidance should clarify that "employer commonality" is not required to establish a MEP. In addition, the Interpretive Bulletin is a substantial change from current practice and raises a number of questions that are not adequately answered. As such, we recommend that the Interpretive Bulletin be re-issued as a proposed rule with an economic analysis of the proposal's impact and proper opportunity to comment on the proposed policy changes.

Comments

The Proposed Regulation Contradicts the Congressional Intent of ERISA. ERISA has been a key component of our retirement system's legal framework for over forty years, regulating important aspects of employer-provided plans at the federal level. Employers have depended on ERISA to ensure that they can offer plans on a nationwide basis, providing fairness to all employees regardless of where they live or work. Chamber members are extremely concerned that state actions establishing and regulating private employer-provided plans will create complexity in the system. Even a small employer can have operations, employees, or facilities in more than one state and, therefore, would have difficulty complying with differing state requirements. The purpose of ERISA's preemption provision was to avoid this very situation.

While there may be debate about the details of what is preempted, it is clear from legislative history that the intent of the statute is to avoid differing state laws governing private retirement benefit programs. Representative John Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee and floor manager for ERISA in the House at the time of statute's passage stated,

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participations by *eliminating the threat of conflicting and inconsistent State and local regulation*…[6]

Senator Jacob Javits, ranking minority member of the Senate Committee on Labor and Public Welfare, and considered one of the primary architects of ERISA echoed the same sentiment, "… the emergence of a comprehensive and pervasive Federal interest and *the interest of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs*."[7]

Furthermore, the Supreme Court has upheld ERISA preemption to mitigate a myriad of state laws from developing. In the preamble to the proposal, the DOL itself acknowledges that "in order to assure nationwide uniformity of treatment, ERISA places the regulation of private-

[6] 120 Cong. Rec. at 29942 (emphasis added).
[7] 120 Cong. Rec. at 29942 (emphasis added).

sector employee benefit plans (including employment-based pension plans) under federal jurisdiction."[8] The DOL goes on to recognize that,

> In various decisions, the [Supreme] Court has concluded that ERISA preempts state laws that: (1) mandate employee benefit structures or their administration; (2) provide alternative enforcement mechanisms; or (3) bind employers or plan fiduciaries to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself.[9]

It is hard to see how state legislation would not "mandate employee benefit structures" or "bind employers… to particular choices" when the intent of certain legislation is to mandate a retirement program for employers that currently do not offer one. Creating different retirement plans in different states will create significant compliance challenges for employers—particularly where states are implementing mandatory requirements for employers. This result clearly runs counter to the statutory intent of ERISA and the purpose of the preemption clause.

The Proposed Regulation Leaves Workers without Important Protections Provided Under ERISA. In the Proposed Regulation, the DOL reasons that it is acceptable to allow state-based retirement plans to operate free from the requirements of ERISA because "[s]tate administration . . . ensures that the program will be administered in accordance with the interests of the state's citizens."[10] ERISA is intended to address the fundamental agency problem that arises when workers cede their earnings to the control and discretion of a third party—usually their employer—to invest and manage for them. To guard against fraud and abuse, ERISA establishes minimum requirements for employers who administer these retirement plans for their workers. These requirements include providing information to participating workers about the retirement plan, its investments, associated fees, funding, vesting schedules, and other key terms.

Further, in accordance with the common law principles of trust law, ERISA imposes strict standards of accountability on plan fiduciaries by requiring them to handle fund assets in the best interests of the plan participants. Fiduciaries who fail to follow these principles may be held personally liable for restoring losses to the plan. The potential penalties are backed by the threat that under ERISA either the government or individual plan participants can exercise the right to sue for lost benefits and breaches of fiduciary duty. Out of respect for federalism, ERISA does not apply to government retirement plans composed solely of government employees, but the same agency concerns animating ERISA are present with these government plans.

Some state retirement plans for public sector workers benefit from the fact that the very state officials who are responsible for governing the plan—*e.g.* State Treasurers, Comptrollers, etc.—are also participants in the plans. Even absent this alignment of interests, however, certain terms of public pension plans are the subject of collective bargaining negotiations and contracts between elected representatives of unions representing government workers, who are plan

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[8] 80 Fed. Reg. at 72007.

[9] 80 Fed. Reg. at 72007 *citing* New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 658 (1995); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990); Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 14 (1987).

[10] 80 Fed. Reg. at 72010.

participants, and the state actors with ultimate control over the plans. No such structural safeguards apply to the state-run plans DOL is facilitating through the Proposed Regulation which cover only private sector workers. No public official will rely on these plans for his or her retirement. Nor will the terms of these plans be the subject of bargaining between public officials and representatives selected by the participants.

The Proposed Regulation Increases Litigation Risks for Employers. The purpose of the Proposed Regulation is to "reduce the risk of state programs being preempted' but the DOL admits that the ultimate determination rests with the courts.[11] As such, there is a risk of increased legal liability for employers that the guidance does not address—an employee or class action suit could challenge the safe harbor definition under this proposal and claim that the employers are subject to ERISA. If a violation of ERISA is found, the employers will have been unwittingly subjected to this increased liability without any recourse against the states or the DOL. To prevent this outcome, final guidance should include protections for employers if courts disavow the safe harbor rule.

In addition, we recommend that the Proposed Regulation include greater detail about ministerial duties on the part of employers in order to make sure employers do not inadvertently become subject to ERISA and the requirements thereunder. Our members are very concerned that if the state follows the guidance but an employer inadvertently provides more than ministerial duties, it could put the employer in the position of being covered under ERISA and at risk of legal liability.

The DOL Should Coordinate with the Treasury Department to Protect Workers and Employers if State-Sponsored Plans Fail to Meet Proper Tax Qualifications. Several state laws provide that they will be void if the plans they create do not receive favorable tax treatment from the IRS.[12] As you are aware, plans rarely receive a determination of tax qualification before they are implemented. Therefore, it is very likely that most state plans will be implemented before they receive assurance from the IRS about their tax status and, thus, it is possible that workers and employers may be involved in a state plan established under this safe harbor that later fails to meet the requirements of proper tax qualifications. As the DOL is providing this safe harbor, we believe it should work with the IRS to ensure that workers and employers—who are not responsible for designing the state plans—are not unfairly harmed by a state plan that fails to meet the requirements for tax qualification.

The Economic Analysis of the Proposed Regulation is Incomplete. The economic analysis of the Proposed Regulations presents many questions. The DOL does recognize that the Proposed Regulation will be responsible for imposing cost burdens on employers because the rule, by removing uncertainty and providing a safe harbor, may facilitate the adoption of subject plans by more states or sooner than might occur in the absence of the DOL rule. However, the

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[11] 80 Fed. Reg. 72006.

[12] *See* Edward A. Zelinsky**,** *California Dreaming: The California Secure Choice Retirement Savings Trust Act*, 20.2 CONNECTICUT INSURANCE LAW J. 549 (2014) (noting that the drafters of the California Secure Choice Retirement Savings Trust Act were "acutely sensitive" to the tax benefits and consequences of the proposal). *Id.* at 549, n. 8 (citing S.B. 1234, 2012 Leg., Reg. Sess. § 3 (Cal. 2012), which added § 100043 to the CAL. GOV'T. CODE and provides that the program will not be implemented "if it is determined that the program is an employee benefit plan under" ERISA or if the employees' accounts under the program "fail to qualify" as IRAs).

agency does not clearly describe or quantify the costs and, despite an admitted lack of knowledge, the agency concludes that the costs imposed on employers will be "minimal." There is no evidence in the analysis on how the DOL arrived at this conclusion—there was no investigation into the costs associated with modifying payroll systems or other administrative costs that employers may incur. Consequently, the DOL's claim of minimal cost impact is at best an arbitrary guess, not founded on credible research.

Furthermore, the DOL admits that the employers most likely impacted by the Proposed Regulation will be small businesses,[13] but the agency has not pursued the regulatory flexibility analysis far enough. DOL needs to do more research to characterize the small businesses most likely to be impacted.

Rather than delineating possible costs, the DOL asks for public comment on this issue.[14] The agency's regulatory analysis duty is not fulfilled by merely asking employers to speak up about the cost burden. The DOL has an affirmative duty to investigate the question of costs independently, and to do so before proposing a regulation. Below is a list of some of the questions that agency needs to investigate and answer before moving forward with this proposal.

- What are companies saying about the cost and other implications of this Proposed Regulation?
- Will the proposed State plans adversely affect plans currently offered by employers?
- Besides the administrative cost of handling payroll deductions for participants, what are the other possible cost burdens that these plans may impose on employers?
- Would the Proposed Regulation expose employers to liabilities that would not be applicable in the absence of the rule?
- Will employers need to exercise diligence to ensure that State plans do qualify for the proposed safe harbor?
- Are there alternative safe harbor definitions that the DOL could have considered and that would have less burdensome impacts on employers?
- How many new employees will participate in the state programs and how does that benefit measure against the financial and administrative costs imposed on employers?
- What are the risks to employees who participate in these savings plans? Are they safer or riskier than traditional employer sponsored plans?

The Proposed Regulation Should be Withdrawn. In the Alternative, the Safe Harbor Should Apply Only to States that Have Voluntary Employer Participation. As stated above, the Chamber believes that the Proposed Regulation is counter to the intent of ERISA and the preemption clause and could increase litigation risks for employers. Rather than condoning additional complexity that undermines the purpose of ERISA, the DOL should defend the preemptive intent of the statute by withdrawing the Proposed Regulation.

At the very least, the guidance should apply only to states that implement programs with voluntary employer participation. On the contrary, however, the Proposed Regulation requires

[13] Id.
[14] 80 Fed. Reg. at 72012.

that state legislation mandate participation by employers. This mandatory requirement is contrary to the voluntary nature if ERISA and should be removed. Moreover, as discussed above, implementing a mandatory requirement on employers directly contradicts the ERISA preemption clause.

The Interpretive Bulletin Creates Unfair Competition Between States and Private Entities. The Chamber is concerned about unfair competition between private providers and the state resulting in the inability of private businesses to offer plans at a competitive price and lower retirement plan coverage of workers. The Interpretive Bulletin provides that a state-sponsored MEP meets the “commonality” requirement even though the only nexus between employers is that their employees reside in the same state. The Chamber believes that this differentiation in standards is unfair to private employers and puts them at a competitive disadvantage. The Chamber believes that the private sector should not be put in the position of having to compete with state governments to provide retirement benefits. State actions could have the unintended consequence of reducing economies of scale for national providers. This would make it more difficult to offer plans to small employers. Moreover, such state programs could also discourage innovation in the private sector.

The Interpretive Bulletin Should Be Reissued As a Proposed Rule. The Interpretive Bulletin presents substantial policy changes and yet does not provide an economic analysis or the opportunity for notice and comment. The primary purpose of the Interpretive Bulletin is to allow states to implement ERISA plans. This policy is a major change from current rules. However, this change is being made without any economic analysis or indication of the impact of these changes. To determine the economic impact, the DOL should review these changes under the ERISA regulatory structure, including the impending proposal to change the definition of fiduciary under ERISA. In addition, the Interpretive Bulletin does not allow for interested parties to submit notice and comment under a proper procedure. Therefore, it seems that avoiding notice and comment in this manner is contrary to the Administrative Procedure Act and the Executive Orders governing regulatory actions.

Conclusion

Thank you for your consideration of these comments. We look forward to working with you to provide retirement security within the Congressional intent and framework of the ERISA statute.

Randel Johnson
Senior Vice President
Labor, Immigration & Employee Benefits
U.S. Chamber of Commerce

Aliya Wong
Executive Director, Retirement Policy
Labor, Immigration & Employee Benefits
U.S. Chamber of Commerce